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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 143.

BENJAMIN J. WEIL, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. 144.

L. VICTOR WEIL, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

REPLY BRIEF FOR PETITIONERS.

I.

(A) At page 11 of Respondent's brief, reference is made to the fact that a one-third interest in the Jonas Weil Estate was owned by children of a sister of the petitioners, and the inference is attempted to be drawn therefrom that petitioners were not free to make payment of the sums due to them. If any inference is to be drawn, it must be to the contrary. As Judge Hand pointed out in his dissenting opinion, when the accounting decree was

made "it must have appeared that there were assets enough to pay all claims in full" (R. 140). Moreover, it is not disputed that the decrees were made by the Surrogate's Court on notice to all the parties, including the infants represented by Special Guardians, and the decrees fixed and settled the interests of all the parties.

(B) The Tax Court found (R. 38), and Respondent concedes (Brief, p. 7) that the total amount paid each executor did not include any interest on such income from 1932 when the first award was made by the Surrogate's Court. The Respondent, apparently, has missed the significance of petitioners' failure to charge or receive any interest on the constructively received income. Although moneys were drawn by the petitioners each year (beginning with 1932) on account of that income, no interest was claimed by them on the balances. If interest had been claimed, that would have indicated that the moneys had not been appropriated to the petitioners in 1932 and 1940, respectively, and that they were merely general creditors. That the petitioners did not charge the Estate any interest is the strongest possible indication that they regarded the funds at all times as theirs and as immediately available to them and, therefore, not subject to the payment of interest.

II.

We think that some comment should be made on the footnote in Respondent's brief (p. 12) to the effect that the dissenting opinion explicitly refrained from passing upon the finding of the Tax Court that sufficient cash was not available to make the payments in the years of claimed constructive receipt. We doubt the correctness of that statement but, in any event, we think that the following quotation from Judge Hand's opinion indicates his views on the subject more accurately:

"The Tax Court's refusal to accept the testimony as conclusive against these possibilities seems to me to stretch its prerogative very nearly to the breaking point; but, as my views are not in any case to prevail, I do not feel myself charged with the duty of deciding whether that refusal was 'clearly erroneous'" (R. 140, 141).

Respectfully submitted,

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